Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

BARBARA SKAGGS, as Guardian of the Person and Estate of Roy Skaggs, an incapacited person,
Petitioner,

v.

OTIS ELEVATOR COMPANY,
a New Jersey corporation,
Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Anthony M. Laizure, Esq.
Counsel of Record

Stipe Law Firm
2417 E. Skelly Drive
Tulsa, OK 74105
(918) 749-0749

Attorney for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

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QUESTION PRESENTED

Does the constitutional guarantee to trial by a fair and impartial jury include the preservation of the opportunity to prove implied bias on the part of a juror?

If so, must juror bias be presumed where a juror lies to the district court during *voir dire*, arguably so that the juror may secure a seat on the jury, and then lies again at an evidentiary hearing conducted by the district court in response to a challenge of the juror's impartiality, effectively precluding a finding of actual bias?

PARTIES TO THE PROCEEDING

Barbara Skaggs, as Guardian of the Person and the Estate of Roy Skaggs, an incapaciated person,

Plaintiff-Appellant,

v.

Otis Elevator Company, a New Jersey corporation,

Defendant-Appellee.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

ARGUMENT FOR GRANTING WRIT 4

Argument I
Bias must be implied when a juror deliberately lies about a material question during *voir dire*, then prohibits inquiry into the reasons for his dishonesty by providing pervasively dishonest responses at a post-trial hearing 5

CONCLUSION 9

APPENDIX

Appendix A
Tenth Circuit Decision 12/29/98 . . . . . 1a

Appendix B
Tenth Circuit Order 2/2/99 . . . . . 15a

Appendix C
District Court Order 11/4/97 . . . . . 17a

TABLE OF AUTHORITIES

Clark v. United States,
289 U.S. 1 (1933) 7

Dennis v. United States,
339 U.S. 162 (1950) 6

Dyer v. Calderon,
151 F.3D 970 (9th Cir. 1998) 4, 5, 7, 8

McDonough Power Equipment, Inc. v. Greenwood,
464 U.S. 548 (1984) 4, 6, 8, 9

Smith v. Phillips,
455 U.S. 209 (1982) 4, 6

United States v. Nell,
526 F.2d 1223 (5th Cir. 1976) 9

United States v. Wood,
299 U.S. 123 (1936) 6

OTHER AUTHORITIES

28 U.S.C. § 1332 (a) 1

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 164 F.3d 511 (10th Cir. 1998). A copy of the opinion is included in Appendix A . The Order of the District Court for the Northern District of Oklahoma denying the motion for new trial is included in Appendix C.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its opinion on December 29, 1998. Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* which was denied on February 2, 1999. (App. B).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . .

STATEMENT OF THE CASE

Petitioner filed suit against Respondent in the United States District Court for the Northern District of Oklahoma. Jurisdiction in the trial court was based on diversity of citizenship, 28 U.S.C. § 1332 (a).

After a four day jury trial, a verdict was entered for Respondent. Petitioner filed a motion for new trial after discovering that the jury foreman had given incorrect responses to the district court's questions during *voir dire*. Specifically, the juror failed to mention the fact that he had

been named as a party defendant in as many as nine lawsuits, including an adversarial proceeding brought by his bankruptcy trustee in which allegations of fraud were made.

On Petitioner's motion, the district court conducted an evidentiary hearing. The juror was the only witness to testify. Testimony revealed the juror to be an educated man, having obtained a degree from the University of Texas, and having worked, as he put it, in "international business" for major corporations.

When asked why he did not mention his extensive litigation history, he said he really didn't understand the question as it pertained to him because the term "lawsuits" was used. He felt the question did not "have any relevance" to him.

Upon questioning by the district court, the juror stated there was nothing about his litigation history which would have interfered with his ability to be fair and impartial. He then volunteered that he had more prejudice against large corporations than anything, and the he was the one person on the panel that did everything possible to help the plaintiff.[1]

After hearing the testimony from the juror, the district court made the following observations about the juror's credibility:

> "The Court finds that indeed this was a material question, and I can assure you that the

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[1]A claim not supported by the fact that the juror was elected foreperson of the jury at 1:30 p.m. and the jury reached a verdict at 1:45 p.m.

Court finds that he failed to answer it honestly. I'm not prepared to credit in any shape, manner or form the explanation proffered on the stand."

"It appears to me that the thrust of the argument at this time is now that we know he's a liar, that's a basis for cause."

"What forms the basis for the proposed dismissal for cause is had he answered honestly, would that form the basis for dismissal for cause. And there is nothing that I see in an honest response, assuming a capability not yet demonstrated in this court, that you would have on that. . ."

"And I will say that the only reason for having this take place in the conference room is that there is nothing about this ruling.....that I felt that I wanted to say out there such that this prospective – or this juror would think that he did something, that there was lack of merit in the motion. There is no lack of merit in the motion, and certainly insofar as anything that he would feel good about knowing. It is highly meritorious on the first prong. . ."

"I will further note that it certainly has occurred to me whether or not to refer this matter to the United States Attorney, recognizing that this was testimony under oath at the time of the voir dire process, and that's just a matter of further consideration by me, but to the extent that that consideration had

been raised earlier in this process, he did nothing today to dispel my feelings about it."

Notwithstanding those sentiments, the district court denied Petitioner's motion for new trial, finding that had the juror answered honestly, Petitioner would not have been able to challenge the juror for cause. McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984). The district court also held that it would not be appropriate to presume or infer bias, relying on Smith v. Phillips, 455 U.S. 209 (1982), O'Connor, J., concurring.

Petitioner filed a timely appeal with the United States Court of Appeals for the Tenth Circuit. During oral argument, counsel for Petitioner brought to the Panel's attention the recent decision of the Ninth Circuit in Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998). Counsel for Petitioner was directed to provide a copy of the decision with the appropriate cover letter following oral argument and he did so.

The Tenth Circuit affirmed the decision of the district court on December 29, 1998. The Panel noted that counsel for Petitioner had essentially conceded at oral argument that Petitioner could not satisfy the second prong of McDonough. Petitioner does not take issue with that finding.

The Panel also held that Petitioner failed to establish implied bias, indicating an unwillingness to hold that the juror's "pervasive dishonesty establishes, as a matter of law, that he harbored an implied bias" against Petitioner. (App. at 13a).

Petitioner's request for *en banc* review was denied on February 2, 1999.

ARGUMENT FOR GRANTING WRIT

Ordinarily, a post-trial evidentiary hearing is an adequate remedy to examine allegations of juror bias. The hearing permits counsel and the court to evaluate the juror's credibility as well as his proffered explanation for acting as he did. However, where the juror is pervasively dishonest in his responses to questions by counsel and the court, then it becomes impossible for the court to determine whether the juror is biased. In those rare circumstances, the court must infer bias on the part of the juror and order a new trial.

The Ninth Circuit Court of Appeals, sitting *en banc*, found accordingly in Dyer v. Calderon, 151 F.3d 970 (9th Cir. 1998). The opinion of the Tenth Circuit Court of Appeals below is in conflict with Dyer because the Panel held that Petitioner was required to show why the prospective juror lied before bias could be presumed. Such a requirement is impossible in a case, such as this, where the juror lies during *voir dire* and then lies repeatedly at the post-trial hearing.

ARGUMENT I

Bias must be implied when a juror deliberately lies about a material question during *voir dire*, then prohibits inquiry into the reasons for his dishonesty by providing pervasively dishonest responses at a post-trial hearing

Ordinarily, *voir dire* examination serves to protect the right of a litigant to a fair and impartial jury by exposing potential bias on the part of prospective jurors. In exercising peremptory challenges and challenges for cause, the litigants must rely on the truthfulness of the responses from the prospective jurors. However, when a juror wilfully conceals material information from the court and the parties, the *voir*

dire process cannot adequately serve it's purpose.

This Court has previously held that "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." Dennis v. United States, 339 U.S. 162, 171-172 (1950). The Court has stated that a post-trial hearing is a sufficient means to determine if indeed a juror has been biased. Smith v. Phillips, 455 U.S. 209, 217-218 (1982).

Although the Court has recognized preservation of the opportunity to prove *actual* bias is guaranteed by the constitutional right to an impartial jury, the Court has yet to make a similar proclamation with respect to claims of *implied* bias. This Court has defined implied bias as "a bias attributable in law to the prospective juror regardless of actual partiality." United States v. Wood, 299 U.S. 123, 134 (1936).

In their concurring opinion in McDonough, Justices Blackmun, Stevens and O'Connor wrote separately to state their understanding that the Court was not foreclosing the ability of a party to demonstrate, at a post-trial hearing, the existence of implied bias. 464 US. at 556.

In addition, Justice O'Connor, in her concurring opinion in Smith, wrote extensively on the issue of implied bias, concluding that the Court had not previously precluded the use of the "conclusive presumption of implied bias" and that the majority opinion likewise did not foreclose the use of implied bias challenges in appropriate circumstances. 455 U.S. at 221-224.

A litigant's right to a fair and impartial trial should not depend on whether a juror's bias is actual or implied because in either instance the juror has violated his oath to decide the

case solely on the evidence presented. This Court has recognized that such a violation of the juror's oath is punishable by contempt. Clark v. United States, 289 U.S. 1 (1933).

Writing for the Court in Clark, Justice Cardozo opined that a juror who gives wilfully evasive or knowingly untrue answers to the court and thereby obtains a seat on the jury through fraud "is a juror in name only. His relation to the court and to the parties is tainted in it's origin; it is a mere pretense and sham." 289 U.S. at 11.

Although it is appropriate to punish the juror through contempt proceedings, such a procedure does little good to the litigant who has been the victim of the juror's fraud and deceit. In such instances, the only remedy available to protect the right to a fair and impartial trial is to hold, as a matter of law, that the juror was biased, and to set aside any verdict tainted by the participation of such perjured juror.

The Ninth Circuit Court of Appeals confronted this question in Dyer and determined that bias indeed would be implied in such a case. The Court of Appeals held that a juror who lies "materially and repeatedly" introduces "destructive uncertainties" into the process. 151 F.3d 970, ¶ 54. The Court of Appeals also noted that an individual who lies to get a seat on the jury "has too much of a stake in the matter to be indifferent."

Unlike the Panel below, the Dyer Court did not require proof of actual bias and did not require Dyer to prove why the juror lied. Instead, the Court held that "a perjured juror is unfit to serve even in the absence of vindictive bias" and, as a matter of law, presumed bias where a juror lies to secure a seat on the jury. 151 F.3d 970, ¶¶53, 56.

The Court recognized that "[N]ot all jurors may walk a perfectly straight line" and candidly observed that "most irregularities can be shrugged off as immaterial to the fairness of the trial." 151 F.3d 970, ¶59. But in considering the magnitude of the juror's lies, the Court ultimately concluded that juror bias must be presumed. Id.

On the other hand, the Court of Appeals for the Tenth Circuit has taken a different approach. The Panel below concluded that a finding of implied bias on the basis of pervasively dishonest responses from a juror would require a finding of implied bias as a matter of law every time the first prong of the McDonough test is satisfied, which in turn would "inexorably eradicate" the second prong of the McDonough test by limiting the inquiry to the sole question of whether the juror's responses were honest or dishonest. (App. A at 12a).

The Tenth Circuit has failed to grasp the argument made by Petitioner and the holding of the Ninth Circuit in Dyer. Petitioner concedes that not every juror who gives an intentionally dishonest response is biased. Thus, the requirement for a post-trial hearing in cases where a juror's impartiality is challenged. Ordinarily, at the post-trial hearing, the juror will offer an explanation for his responses during *voir dire*, and the district court can evaluate the demeanor of the juror and the proffered explanation and make the appropriate determination with respect to the allegations of bias.

However, in those cases, such as Dyer and the instant case, where the juror refuses to admit the answers given during *voir dire* were incorrect or dishonest, and where the record clearly establishes a pattern of deception on the part of the juror, the district court's ability to protect the guarantee of a litigant's right to prove actual bias is destroyed, and bias

must be implied as a matter of law, unless there is compelling evidence which would remove any doubt as to the juror's impartiality. Doubts regarding juror bias must be resolved against the juror. United States v. Nell, 526 F.2d 1223, 1230 (5th Cir. 1976).

Such a finding does not eradicate the second prong of McDonough. When a rational and believable explanation is given by the juror for his dishonest or incorrect *voir dire* responses, McDonough would still apply and the party challenging the juror would still have to demonstrate that a correct response would have given rise to a challenge for cause. It is only when the juror lies "materially and repeatedly", thus preventing the district court and the parties from evaluating a juror's motives for giving incorrect or dishonest answers, that bias will be implied as a matter of law to protect the constitutional guarantee of a fair and impartial trial.

CONCLUSION

The Court should grant *certiorari* to recognize the use of implied bias challenges as a means to protect a litigant's right to a fair and impartial trial. Furthermore, the Court should resolve the conflict between the Ninth and Tenth Circuits on the issue.

Petitioner concedes that there are adequate safeguards to protect a litigant's right to a fair and impartial jury, to wit; the *voir dire* process, and when appropriate, a post-trial evidentiary hearing to evaluate claims of juror bias. Petitioner likewise concedes the wisdom of this Court's statement in McDonough that litigants are entitled to fair trials, not perfect trials.

However, there are circumstances when these safeguards are inadequate to protect the constitutional guarantee to a fair and impartial jury trial. The Court has recognized the seriousness of a juror's oath to answer questions propounded by the court honestly by holding that a violation of the oath to be punishable as contempt. When a juror does wilfully violate his oath and thereby obtains a seat on the jury, the proceedings are permanently and irreparably tainted unless some credible and believable explanation for the juror's conduct is given. Absent such an explanation, the constitutional right to a fair and impartial jury trial can protected only if the juror is found as a matter of law to be biased and the verdict returned by such juror set aside.

The Court should grant *certiorari*, reverse the Tenth Circuit and order a new trial.

Respectfully submitted,

/s/_____
ANTHONY M. LAIZURE
Stipe Law Firm
2417 E. Skelly Dr.
Tulsa, OK 74105
Telephone: 918.749.0749
Fax: 918.747.0751

Attorneys for Petitioner
Barbara Sue Skaggs

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed December 29, 1998]

No. 97-5213

BARBARA SKAGGS, as Guardian of the Person and the Estate of Roy Skaggs, an incapacitated person, Plaintiff-Appellant,

v.

OTIS ELEVATOR COMPANY, a New Jersey corporation, Defendant-Appellee.

DECISION

Appeal from the United States District Court
for the N. District of Oklahoma
(D.C. No. 96-CV-605)

Anthony M. Laizure, of Stipe Law Firm, Tulsa, Oklahoma, for Appellant.

Robert E. Manchester, of Manchester & Pignato, P.C.,

(Shannon K. Emmons and Stacey Haws Felkner, of Manchester & Pignato, P.C., with him on the brief), Oklahoma City, Oklahoma, for Appellee.

Before **BRORBY, MURPHY,** Circuit Judges, **MARTEN,*** District Judge.

MURPHY, Circuit Judge.

Barbara Skaggs ("Skaggs"), individually and as guardian of the person and estate of Roy Skaggs, was the plaintiff[1] in an civil lawsuit filed against defendant, Otis Elevator Company ("Otis"). After a four day jury trial, a verdict was entered for Otis. Skaggs filed a motion for a new trial after discovering that a member of the jury had given an incorrect response during voir dire questioning. The district court held an evidentiary hearing and found that the juror's response had been intentionally incorrect but that a correct response by the juror would not have provided Skaggs with a basis to challenge him for cause. The district court also held that Skaggs had failed to show either actual or implied bias on

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* Honorable J. Thomas Marten, United States District Judge, U. S. District Court for the District of Kansas, sitting by designation.

[1] Roy Skaggs was originally named as plaintiff in the lawsuit. Sometime after the lawsuit was filed, Roy Skaggs' wife, Barbara Skaggs, was substituted as plaintiff, both individually and in her capacity as guardian of the person and the estate of Roy Skaggs. Any reference hereinafter to "Skaggs" is to Barbara Skaggs, the substituted plaintiff.

the part of the juror and denied the motion. Skaggs appeals the district court's denial of the motion for a new trial and argues that the juror's intentionally dishonest answers during voir dire and during the post-trial hearing demonstrate that he was biased. This court has jurisdiction over this appeal from a final judgment pursuant to 28 U.S.C. § 1291. After examining the briefs of the parties and the record, this court **AFFIRMS.**

I. FACTUAL BACKGROUND

On January 5, 1995, Roy Skaggs was working on a construction site in the proximity of an elevator manufactured by defendant-appellee, Otis Elevator Company. Mr. Skaggs was injured when he was thrown against the elevator as it descended the elevator hoistway. Mr. Skaggs claimed he suffered serious and permanent injuries and that these injuries were the result of Otis' negligence. A four-day trial resulted in a jury verdict in favor of Otis.

Subsequent to the jury verdict, Skaggs discovered that the foreperson of the jury, Douglas Van Zandt, had been a named party in several lawsuits. During voir dire, the district court had directed the following question to the venire: "Have any of you-all, or members of your immediate family, ever participated in a lawsuit, either as a party or in some other capacity such as a witness?" No member of the panel, including Mr. Van Zandt, responded. Skaggs filed a motion for a new trial on the grounds that Van Zandt's failure to respond to the court's question during voir dire denied her a fair trial by an impartial jury. In the alternative, Skaggs requested an evidentiary hearing to probe the matters raised in the motion for a new trial.

The district court conducted the requested hearing and juror Van Zandt was questioned by the parties and by the court. At the hearing, Mr. Van Zandt admitted being involved in at least nine lawsuits. He admitted to filing bankruptcy and to being named as a defendant in several suits involving his nonpayment of financial obligations to third parties. Mr. Van Zandt also acknowledged that he had been divorced prior to 1985 and admitted that he had been charged with a felony for writing a "bogus" check in 1988.

During the hearing, Mr. Van Zandt was asked to explain why he had not responded affirmatively to the district court's question regarding his prior participation in lawsuits. He offered the following explanation: "I didn't understand [the question] as it pertained to me . . . ." When pressed by Skaggs' attorney, Van Zandt expanded on his explanation by stating that he believed the court, in posing the question, was searching for information on whether prospective jurors had been involved in lawsuits either similar to the one brought by Skaggs or involving significant damages, not lawsuits involving "my personal financial problems." Based on the evidence presented at the hearing, the district court found that Mr. Van Zandt had been intentionally dishonest when he failed to disclose his participation in the lawsuits. The court also found that the explanation given by Van Zandt for his silence during voir dire lacked credibility, stating: "I'm not prepared to credit in any shape, manner or form the explanation proffered on the stand." The court, however, held that Skaggs had failed to show Van Zandt was actually or impliedly biased against her and denied Skaggs' motion for a new trial. This appeal followed.

II. STANDARD OF REVIEW

A district court's denial of a motion for a new trial is reviewed for an abuse of discretion. *See Weese v. Schukman*, 98 F.3d 542, 549 (10th Cir. 1996). The ruling will be reversed only if the district court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* When the district court's decision turns on an issue of law, however, its determination on that question is reviewed *de novo*. *See id.*

III. ANALYSIS

The Seventh Amendment to the United States Constitution guarantees a litigant in a civil proceeding the right to a trial by jury. *See* U.S. Const. amend VII. Although the Seventh Amendment does not contain language identical to that found in the Sixth Amendment, which specifically guarantees a criminal defendant the right to an "impartial jury," the right to a jury trial in a civil case would be illusory unless it encompassed the right to an impartial jury.[2] "This right [to an impartial jury] is neither enlarged

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[2] We recognize that most of the reported cases addressing the issue of juror bias involve criminal defendants and, therefore, the right to an "impartial jury" guaranteed by the Sixth Amendment. Although the issue in this appeal is governed by the Seventh Amendment, the reasoning of the Sixth Amendment cases concerning juror bias is germane to the analysis of the issue raised by Skaggs herein. Additionally, *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), discussed at length *infra*, involved civil litigants and not a criminal defendant.

nor diminished by the Fifth Amendment provision that a person shall not 'be deprived of life, liberty, or property, without due process of law.' [The] denial of trial by an impartial jury is also the denial of due process . . . ." *Casias v. United States*, 315 F.2d 614, 615 (10th Cir. 1963) (en banc).

It is a well-settled principle that a litigant is entitled to a fair trial, albeit not a perfect one. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984). An impartial jury is an essential element of a litigant's right to a fair trial. *See id.* at 554. The examination of prospective jurors during voir dire is intended to expose possible juror biases and is employed to insure that jurors are impartial. *See id.* Not all juror biases, however, adversely affect a litigant's right to a fair trial. To violate due process, the bias must affect the juror's ability to impartially consider the evidence presented at trial. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982).

A. *The McDonough Test*

The Supreme Court has articulated a two-prong test to be applied to determine whether a litigant is entitled to a new trial in the face of allegations that a juror's voir dire responses were untruthful. "[T]o obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough*, 464 U.S. at 556.

The first prong of the *McDonough* test is satisfied if

the movant can prove that the juror in question intentionally gave an incorrect answer. *See Gonzales v. Thomas*, 99 F.3d 978, 984 (10th Cir. 1996) (applying the *McDonough* test in a criminal case), *cert. denied*, 117 S. Ct. 1342 (1997). Additionally, the answer must have been in response to a material question. *See id.* A juror's honesty during voir dire is a factual determination reviewed for clear error. *See id.* at 985. The second prong of the McDonough test is met only if the movant can satisfactorily show the juror's correct response to the material question would have provided the movant with a valid basis to challenge the juror for cause. *See id.* at 984.

In this case, the district court held an evidentiary hearing during which the juror in question, Mr. Van Zandt, was questioned by the parties and by the court. After the hearing, the district court stated: "The Court finds that indeed this was a material question, and I can assure you that the Court finds that [Van Zandt] failed to answer it honestly." Nothing in the record indicates this finding is clearly erroneous. The record contains evidence that Mr. Van Zandt was educated and experienced in business and had the ability to understand the question posed by the district court. The wording of the question was straight-forward and unambiguous. Additionally, Mr. Van Zandt had been involved in not one, but at least nine lawsuits, a fact which would be difficult for most individuals to forget or overlook. The evidence in the record is more than ample to support the district court's finding that Van Zandt gave an intentionally dishonest answer to a material question posed during voir dire questioning. Therefore, the first prong of *McDonough* is satisfied.

The district court next concluded that if Van Zandt had

disclosed his participation in the lawsuits, he would not have been excused for cause during voir dire questioning. Skaggs conceded during oral argument in this appeal that Van Zandt's participation in the nine lawsuits would not have provided grounds for a challenge for cause. By her own admission, Skaggs has therefore failed to satisfy the second prong of the *McDonough* test. Correspondingly, the district court did not abuse its discretion in denying Skaggs' motion for a new trial on her *McDonough* claim.

B. *Actual or Implied Bias*

Before the *McDonough* test was adopted by the Supreme Court, litigants alleging juror impartiality had the opportunity to prove actual or implied bias on the part of a juror after a verdict was entered. *See, e.g., Williams v. United States*, 418 F.2d 372,377 (10th Cir. 1969). The Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith*, 455 U.S. at 215.

Inability to satisfy the *McDonough* test does not always preclude a litigant from presenting evidence of a juror's actual or implied bias. *See Gonzales*, 99 F.3d at 985-86 ("Cases such as this one -- based on allegations of dishonest voir dire answers -- fall within a larger category that comprises all cases of alleged juror partiality, whatever the source of partiality."). *McDonough* merely provides a party who alleges juror dishonesty during voir dire with an additional vehicle to obtain a new trial by demonstrating juror bias. The advent of the test did not eliminate a litigant's broader historic right to prove actual or implied juror bias. *See id.* at 985-86.

Although unable to prove a juror's incorrect response to a material question was intentional, a movant may introduce evidence demonstrating bias on the part of a juror who gave an incorrect but not intentionally dishonest answer during voir dire. *See, e.g., id.* at 985-91; *see also United States v. Lawhorne*, No. CR. 3:96CR139, 1998 WL 833853, at *18 (E.D. Va. 1998) (holding that a juror who unintentionally gave an incorrect answer during voir dire was nevertheless actually biased in favor of the prosecution). Consonantly, as in this case, a movant may be unable to prove that a juror's intentionally incorrect answer to a material question would have provided a basis for challenge for cause. The movant who fails to prove the second prong of the *McDonough* test has necessarily failed to prove that the juror's actual or implied bias could have been established from the juror's correct response. Nevertheless, evidence of the juror's motive for intentionally providing an incorrect answer, or evidence of additional circumstances occurring outside the voir dire process, may demonstrate the juror's bias. In such unusual situations, a litigant should not be foreclosed from introducing evidence to demonstrate that the juror was biased and that the bias affected the litigant's right to a fair trial.

A litigant who makes a general claim of juror bias may be entitled to a hearing at which she has the opportunity to prove the alleged bias. *See Burton v. Johnson*, 948 F.2d 1150, 1156 (10th Cir. 1991). "[I]t remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias or, in exceptional circumstances, that the facts are such that bias is to be inferred." *McDonough*, 464 U.S. at 556-57 (Blackmun, J.,

concurring). The moving party bears the burden of establishing juror bias. *See Wainwright v. Witt*, 469 U.S. 412, 423 (1985).

Actual bias is a factual finding reviewed for clear error. *See Gonzales*, 99 F.3d at 986. Actual bias can be shown by the express admission of the juror.[3] *See, e.g., United States v. Easter*, 981 F.2d 1549, 1553 (10th Cir. 1992). A finding of actual bias is "based upon express proof, e.g., . . . admission by the prospective juror of a state of mind prejudicial to a party's interest." *United States v. Haynes*, 398 F.2d 980, 984 (2d. Cir. 1968).

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[3] It appears that some confusion has crept into the definition of the term "actual bias." In a line of cases, this court has stated that "[a]ctual bias may be found either by an express admission, or by proof of specific facts which show such a close connection to the facts at trial that bias is presumed." *Baca v. Sullivan*, 821 F.2d 1480, 1483 (10th Cir. 1987); *see also Staley v. Bridgestone/Firestone, Inc.*, 106 F.3d 1504, 1514 (10th Cir. 1997); *Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1467 (10th Cir. 1994); *Burton v. Johnson*, 948 F.2d 1150, 1159 n.10 (10th Cir. 1991). This definition of actual bias more accurately includes both actual bias (i.e., a question of fact which may be proved by a juror's express admission), and implied bias (i.e., a question of law proved by facts which show such a close connection between the juror's experiences and the facts at trial that bias can be presumed as a matter of law). *See, e.g., United States v. Easter*, 981 F.2d 1549, 1553 (10th Cir. 1992); *United States v. Wood*, 299 U.S. 123, 133 (1936) ("The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law.").

The determination of implied bias is a question of law reviewed *de novo*. *See Burton*, 948 F.2d at 1158. Implied bias can be proved by showing that the juror had a "personal connection to the parties or circumstances of the trial." *Gonzales*, 99 F.3d at 987. These types of situations include "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Smith*, 455 U.S. at 222 (O'Connor, J., concurring) (discussing implied bias in a criminal case). Implied bias can also be found when there are similarities between the personal experiences of the juror and the issues being litigated. *See Gonzales*, 99 F.3d at 987. "[I]mplied bias may be found even though a juror denies any partiality." *Id.* A juror's dishonesty during voir dire is one factor to be considered when determining whether the juror was impliedly biased. *See id.* at 989.

In addition to her *McDonough* claim, Skaggs asserts a general claim of juror bias based upon juror Van Zandt's dishonesty. The premise of Skaggs' argument is that the only reasonable explanation for Van Zandt's dishonesty is that he was biased against Skaggs and lied to insure that he would be seated on the jury and influence the outcome of the civil trial. The district court ordered a post-trial hearing to address Skaggs' claim of juror bias. Skaggs was given the opportunity to question Van Zandt and attempt to uncover the reason for his intentionally incorrect answer.

During the post-trial hearing, Van Zandt never expressly admitted that he was biased against Skaggs. To the contrary, Van Zandt emphatically and repeatedly denied any

bias against Skaggs. During questioning by Skaggs' attorney he responded: "And I can also tell you that in no way possible did this bias me in any way with my decision or that jury's decision." When questioned by the court, Van Zandt replied: "I did not bring any point of view to this proceeding as a result of anything that had happened to me in the past, sir." During the hearing, Skaggs was unable to elicit from Van Zandt an admission of his bias against Skaggs. Although the district court did find that Van Zandt's explanation of why he failed to disclose his participation in lawsuits was not credible, it did not specifically find that his assertion that he was not biased lacked credibility. "'[T]he district court is in the best position to observe the juror and to make a first-hand evaluation of his ability to be fair.'" *Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1467 (10th Cir. 1994) (quoting *Wilson v. Johns-Manville Sales Corp.*, 810 F.2d 1358, 1361 (5th Cir. 1987)). Accordingly, the district court's finding that Skaggs failed to prove actual bias on the part of Van Zandt was not clearly erroneous.

Although she has failed to demonstrate actual bias, Skaggs advocates that Van Zandt's bias against her should be implied from either the fact that he gave an intentionally dishonest answer during voir dire or from the fact that he lied again during the post-trial hearing.

To adopt Skaggs' argument that Van Zandt's bias can be implied solely from his dishonest response during voir dire would require this court to hold that any time the first prong of the *McDonough* test is satisfied, the juror is biased as a matter of law. Such a ruling would inexorably eradicate the second prong of the *McDonough* test. It would reduce the *McDonough* inquiry to the sole question of whether the

juror's response was honest or dishonest. *See Gonzales*, 99 F.3d at 989 (a juror's dishonesty during voir dire is just one factor to be considered when evaluating a claim of implied bias). While Skaggs may have been unable to uncover the true reason Van Zandt gave an intentionally dishonest answer during voir dire, Skaggs offered no evidence during the post-trial hearing from which this court could conclude that Van Zandt's reason for remaining silent during voir dire was to ensure himself a seat on the jury. An equally plausible explanation for Van Zandt's silence may be his embarrassment to admit before the court and the venire that he had experienced financial difficulties and consequent litigation.

The district court's finding that Van Zandt's explanation for his silence during voir dire lacked credibility is not clearly erroneous. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985). Skaggs has not shown, however, that Van Zandt's subsequent dishonesty during the post-trial hearing demonstrates that he was biased against Skaggs. At the post-trial hearing, Van Zandt may have fabricated an explanation for his silence during voir dire because he was embarrassed that his previous lie had been uncovered.

Whatever the reason for Van Zandt's dishonesty, the record does not establish that he responded dishonestly during voir dire and again during the post-trial hearing because he had an implied bias against Skaggs. In the absence of any other evidence establishing Van Zandt's implied bias, we are unwilling to hold that Van Zandt's pervasive dishonestly establishes, as a matter of law, that he harbored an implied bias against Skaggs.

IV. CONCLUSION

The district court's finding that Skaggs failed to show actual bias was not clearly erroneous. Additionally, we hold that, as a matter of law, Skaggs has not shown implied juror bias. Accordingly, the district court did not abuse its discretion when it denied Skaggs' motion for a new trial on her general claim of juror bias.

The judgment of the district court is **AFFIRMED.**

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed February 2, 1999]

No. 97-5213

BARBARA SKAGGS, as Guardian of the Person and the Estate of Roy Skaggs, an incapacitated person, Plaintiff-Appellant,

v.

OTIS ELEVATOR COMPANY, a New Jersey corporation, Defendant-Appellee.

ORDER

Before **BRORBY**, **MURPHY**, Circuit Judges, **MARTEN**,* District Judge.

* The Honorable J. Thomas Marten, United States District Judge, U.S. District Court for the District of Kansas sitting by designation.

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing en banc is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

/s/_____
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

[Filed November 4, 1997]

No. 96-CV-605-H

BARBARA SKAGGS, as Guardian of the Person and the Estate of Roy Skaggs, an incapacitated person, Plaintiff,

v.

OTIS ELEVATOR COMPANY, a New Jersey corporation, Defendant.

ORDER

This matter comes before the Court on the Plaintiff's motion for a new trial, or in the alternative, request for evidentiary hearing (Docket # 57). This matter was tried before a jury from July 14 to July 17, 1997. A jury verdict in favor of Defendant Otis Elevator Company ("Otis") was entered in this case on July 17, 1997, with final judgment in favor of Otis entered on the docket on August 1, 1997 (Docket #55). Plaintiff now requests a new trial on the

grounds that one of the prospective jurors failed to give an honest answer to the one of the Court's inquiries during voir dire. An evidentiary hearing was held in this matter on October 30, 1997 in accordance with McDonough Power Equip. v. Greenwood, 464 U.S. 548 (1984) and Gonzales v. Thomas, 99 F.3d 978 (10th Cir. 1996).

Fed. R. Civ. P. 59(a) provides that

> [a] new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States ....

The Supreme Court articulated the standard for a new trial under this Rule in McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984). The Court held that to obtain a new trial, a party must "first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." Id. at 556.

In the instant case, Plaintiff contends that one of the jurors in this action, Douglas Van Zandt, failed to respond honestly to questions during voir dire. Specifically, the Court inquired during voir dire whether any member of the panel had participated in a lawsuit as either a party or a witness, or whether any member had a close relative that had been involved in a lawsuit. Mr. Van Zandt remained silent despite the fact that he, according to the evidence adduced at the evidentiary hearing, has been involved in at least six lawsuits

from 1988 until May 7, 1997. Plaintiff argues that Mr. Van Zandt's failure give honest answers to these material questions posed by the Court masked his bias, thereby denying Plaintiff's right to a fair trial. Further, Plaintiff argues that given Mr. Van Zandt's negative experiences within the legal system, it is "hardly probable that [Mr.] Van Zandt could be fair to Plaintiff, who was seeking a substantial sum of money from the Defendant." Pl. Br. at 6.

The Court finds that Plaintiff has failed to make the showing required to satisfy the McDonough standard. To succeed, Plaintiff must establish that a correct response from Mr. Van Zandt would have provided a valid basis for a challenge for cause. To establish a causal challenge, Plaintiff must demonstrate actual prejudice or bias on Mr. Van Zandt's part. Vasey v. Martin Marietta Corp, 29 F.3d 1460, 1467 (10th Cir. 1994).

According to the record, Mr. Van Zandt has been involved in at least the following lawsuits:

1. In re Van Zandt, Douglas Thornton and Van Zandt, Sandra Yvonne, Debtors, No. 96-03919 (Bankr. N.D. Okla.) (filed September 30, 1996; dismissed May 7, 1997).

2. Kirtley, Trustee v. Van Zandt and Van Zandt, No. 96-0432-W (Bankr. N.D. Okla. Dec. 26, 1996).

3. Carle, Higgings, Mosier, & Taylor, v. Van Zandt and Van Zandt, No. SC-96-182 (Rogers Co. Dist. Ct.)

4. Baden v. Van Zandt and Van Zandt, No. CJ-96-418 (Rogers Co. Dist. Ct.)

5. Cole v. Van Zandt and Van Zandt, No. SC-95-264 (Tulsa Co. Dist. Ct.)

6. Oklahoma v. Doug Van Zandt, No. CRF 88-263 (Rogers Co. Dist. Ct. Nov. 15, 1988).

Additionally, in the bankruptcy proceeding filed September 30, 1996, three parties were listed in the papers as judgment creditors: Claremore Welding Supply for a claim incurred in August, 1994; Edward Arrigoni for a claim incurred in September, 1994; and Tass, Inc. for a claim incurred April, 1995.

Clearly, Mr. Van Zandt was not involved in any action similar to the instant case for personal injury. Thus, there is nothing in the litigation record that, on its face, would support a challenge for cause. It is settled law that the fact that Mr. Van Zandt has been involved in prior litigation does not alone necessitate striking him for cause. McDonough 464 U.S. at 556. Further, during the evidentiary hearing in this matter, the Court questioned Mr. Van Zandt about his previous litigation and is satisfied that his failure to give honest answers to questions during voir dire established no valid basis for a challenge for cause. Accordingly, the Court finds that a new trial is not warranted under McDonough.

The Court further finds that Plaintiff has failed to demonstrate actual or implied bias so as to warrant a new trial. Gonzales, 99 F.3d at 985 (10th Cir. 1996), cert. denied,

117 S. Ct. 1342 (1997). In Gonzales, the Tenth Circuit considered a situation where it could not be said that the juror gave a dishonest answer during voir dire. Id. at 985. In that case, the party challenging the fairness of the jury fails the first prong of the McDonough test. Gonzales, 99 F.3d at 985. The Tenth Circuit explained that the McDonough test is not the only avenue available to a party seeking relief on the basis of juror impartiality. Gonzales, 99 F.3d at 985. Instead, the trial court may order a hearing to determine whether actual bias existed or whether bias is, in exceptional cases, to be presumed. Id. (interpreting McDonough 464 U.S. at 556 (Blackmun, J., concurring)).

First, this is not the case where bias can be presumed or inferred. As described in Smith v. Phillips, 455 U.S. 209 (1982), those cases concern matters such as "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." Id. at 222 (O'Connor, J., concurring). And, as already determined under the McDonough test, neither is this a case where actual bias exists.

The Court is very troubled that any juror would fail to give honest responses to questions during voir dire. However, the Court concludes that, based on the record in this case, including the questioning of Mr. Van Zandt at the evidentiary hearing in this matter, Plaintiff has failed to establish the requirements for a new trial under applicable law. Accordingly, Plaintiff's motion for a new trial is hereby denied.

IT IS SO ORDERED.

This 4th day of November, 1997.

/s/_____
Sven Erik Holmes
United States District Judge